Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

75-1013

In the

# Supreme Court of the United States

~~THE PEOPLE OF THE STATE OF~~ COLORADO,

*Plaintiff-Respondent,*

v.

ANTHONY L. BRONCUCIA,

*Defendant-Petitioner.*

**PETITION FOR WRIT OF CERTIORARI**

## PETITION FOR CERTIORARI FROM JUDGMENT OF COLORADO SUPREME COURT

EDWARD B. TOWEY
Attorney for Defendant-Petitioner
1701 West 72nd Avenue, Suite 210
Denver, Colorado 80221
Telephone: 303-428-7411

IN THE SUPREME COURT

OF

THE UNITED STATES

NO. 26557

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF COLORADO,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>ANTHONY L. BRONCUCIA,<br><br>Defendant-Petitioner. | ) | ENTRY OF APPEARANCE |

COMES NOW, Edward B. Towey, and enters his appearance as counsel on behalf of Anthony L. Broncucia in the above captioned action.

EDWARD B. TOWEY

Attorney for Defendant-Petitioner
1701 West 72nd Ave., Suite 210
Denver, Colorado 80221
Telephone: 428-7411

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... iii-v

I. REFERENCE TO THE OFFICIAL REPORT OF THE OPINION DELIVERED BY THE COLORADO SUPREME COURT ..... 1

II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED, SHOWING (a) THE DATE OF THE JUDGMENT SOUGHT TO BE REVIEWED, AND THE TIME OF ITS ENTRY, (b) THE DATE OF THE ORDER WHICH DENIED DEFENDANT-PETITIONER'S PETITION FOR REHEARING, AND (c) THE STATUTORY PROVISION BELIEVED TO CONFER ON THIS COURT JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION BY WRIT OF CERTIORARI ..... 1-2

III. STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW ..... 2

IV. STATEMENT OF THE CONSTITUTIONAL PROVISIONS WHICH THE INSTANT CASE INVOLVES ..... 2-3

V. STATEMENT OF THE CASE, SPECIFYING THE STAGE IN THE PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND IN THE APPELLATE COURT, AT WHICH, AND THE MANNER IN WHICH, THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED AND THE WAY IN WHICH THEY WERE PASSED UPON BY EACH COURT ..... 3-21

## TABLE OF CONTENTS (Cont'd)

Page

VI. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI ..... 21-22

EXHIBIT "A"
Appeal from the District Court of the City and County of Denver ..... 27-34

EXHIBIT "B"
Petition for Rehearing ..... 35-39



## TABLE OF AUTHORITIES

*CASES*

Page

Gollaher v. United States, 419 F.2d 520 (9th Cir.), *cert denied* 936 U.S. 960 (1969) ..... 16

In re Addonizio, 53 N.J. 107, 248 A.2d 531 (1968) ..... 9

In re Kelley 350 F. Supp. 1198 (E.D. Ark. 1972) ..... 16, 18

Lawn v. United States, 355 U.S. 339 (1958) ..... 11

Miranda v. Arizona, 384 U.S. 436 (1966) ..... 2, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17, 18, 22

O'Neal v. State, 468 P.2d 59 (Okl. Cir. 1970) ..... 17, 18

People v. Austin, 159 Colo. 445, 448, 412 P.2d 453 (1966) ..... 9

People v. Clifford, 105 Colo. 316, 332 98 P.2d 272, 275 (1939) ..... 7, 9, 11

People v. Rauch, 140 Misc. 691, 251 N.Y.S. 454 (1931) ..... 10, 11

People v. Spencer, ____ Colo. ____ , 512 P.2d 260 (1937) ..... 12, 18, 19

People v. Vosburg, 21 Misc. 2d 372, 193 N.Y.S. 2d 158 (1959) ..... 8, 10

People v. Werkes, 46 Misc. 2d 1020 261 N.Y.S. 2d 726 (1965) ..... 10

State v. Corteau, 198 Minn. 433, 270 N.W. 144 (1936) ..... 10

State v. DeCola, 33 N.J. 335, 164 A.2d 729 (1960) ..... 9, 11

State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955) ..... 9

*CASES (Cont'd)*

State v. Redinger,
64 N.J. 41, 32 A.2d 129 (1973) ..... 10, 11, 17, 18

State v. Ruggieri, 19 Utah 2d 216,
429 P.2d 969, 973 (1967) ..... 10, 17, 18

State v. Williams, 59 N.J. 493,
284 A.2d 172, 178 (1971) ..... 9, 18

The People of the State of Colorado v. Anthony L. Broncucia, ____ Colo. ____,
540 P.2d 1101 (1975) ..... 1

United States v. Andrews, 370 F. Supp. 365,
371 (D. Conn. 1974) ..... 13

United States v. Corallo, 413 F.2d 1306 (2d Cir.)
*cert denied* 396 U.S. 958 (1969) ..... 14

United States v. DiGiovanni, 297 F.2d 409,
412 (7th Cir.), *cert. denied* 393 U.S.
924 (1968) ..... 15

United States v. DiMichele, 375 F.2d 959 (3d Cir.)
*cert. denied,* 389 U.S. 838 (1967) ..... 13

United States v. Fruchtman, 282 F. Supp. 534 (N.D. Ohio 1968), *cert. denied* 400 U.S. 849 (1970) ..... 15

United States v. Kreps, 349 F. Supp. 1198
(E.D. Wis. 1972) ..... 15, 16, 18, 19

United States v. Lardieri,
497 F.2d 317 (3d Cir. 1974) ..... 13

United States v. Lawn,
115 F. Supp. 674 (S.D.N.Y. 1953) ..... 11

United States v. Luxenberg,
374 F.2d 241 (6th Cir. 1967) ..... 14, 15

United States v. Mandujano,
469 F.2d 1050 (5th Cir. 1974) ..... 13, 14, 18

United States v. Pepe, 367 F. Supp. 1365,
1368 (2d Cir. 1973) ..... 9, 11

United States v. Rangel, 469 F.2d 1059
(5th Cir. 1974) ..... 13, 14, 18

United States v. Rangel and Mandujano,
365 F. Supp. 155 (W.D. Tex. 1973) ..... 13



OTHER AUTHORITIES CITED

Page

C.R.S. 1973, Vol. 1, p. 164 ..... 2
Rule 19(1) (a) Revised Rules of Supreme Ct. ..... 1, 22
U.S. Sup. Ct. Rule 19(1) (a), 28 USCA 30 ..... 2, 22
U.S. Sup. Ct. Rule 22(1), 28 U.S.C.A. 36 ..... 2
Colo. Const. Art. II, §25 ..... 3
U.S. Const. Amend. XIV, §1 ..... 3,22
U.S. Const. Amend. V ..... 3
1 U.S.C. XLVIII (1970) ..... 3
1 U.S.C. XLIX (1970) ..... 3

In the

# Supreme Court of the United States

| | |
|---|---|
| **THE PEOPLE OF THE STATE OF COLORADO,**<br>*Plaintiff-Respondent,*<br>*v.*<br>**ANTHONY L. BRONCUCIA,**<br>*Defendant-Petitioner* | **PETITION FOR WRIT OF CERTIORARI** |

COMES NOW Anthony L. Broncucia, by and through his attorney, Edward B. Towey, and for his Petition for Writ of Certiorari, alleges as follows:

1. A review in the Supreme Court of the United States on Writ of Certiorari is hereby requested from the judgment of the Colorado Supreme Court in Case No. 26557, entitled *The People of the State of Colorado v. Anthony L. Broncucia,* ____ Colo. ____, 540 P.2d 1101 (1975). A copy of said opinion which was filed in the Colorado Supreme Court is in the appendix hereto marked as Exhibit "A". A copy of Anthony L. Broncucia's Petition for Rehearing of the above-captioned action which was also filed in the Colorado Supreme Court and a copy of the Court's Order denying said petition are in the appendix hereto marked as Exhibit "B".

2. The jurisdiction of this Court is invoked pursuant to Rule 19(1)(a) of the Revised Rules of the Supreme Court of the United States which provides that a review on writ on certiorari may be considered "where a state court has decided a federal question of substance not theretofore determined by

this court, or has decided it in a way probably not in accord with applicable decisions of this court." U.S. Sup. Ct. Rule 19(1) (a), 28 U.S.C.A. 30.

The date of the judgment of the Colorado Supreme Court sought to be reviewed, and the time of its entry are September 15, 1975. Pursuant to U.S. Sup. Ct. Rule 22(1), 28 U.S.C.A. 36, "A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment."

The date of the Order which denied Anthony L. Broncucia's Petition for Rehearing is October 20, 1975.

3. One of the questions presented for review is whether or not the Colorado Supreme Court erred in not overruling the District Court's denial of defendant-petitioner's motion to suppress his testimony before the state Grand Jury. Basically, this question addresses itself to whether or not defendant-petitioner's testimony should have been held inadmissible given the fact that investigation had been "focused" upon the defendant-petitioner at the time of his testimony before the Grand Jury on July 14, 1972, and defendant-petitioner was not advised that he was under investigation for any crime and, consequently, was not advised of the nature of the charges for which he was being investigated.

The other question presented for review is whether or not the Colorado Supreme Court erred in not overruling the District Court's denial of defendant-petitioner's motion to suppress his testimony before the state Grand Jury given the fact that defendant-petitioner was not fully advised of his constitutional rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966), when he appeared before the Grand Jury as a "putative" or "focused-on" defendant.

4. Colo. Const. Art. II, §25: "Due process of Law – No person shall be deprived of life, liberty or property, without due process of law." Colo. Rev. Stat. 1973, Vol. 1, p. 164.



U.S. Const. Amend. XIV, §1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added). 1 U.S.C. XLIX (1970).

U.S. Const. Amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (emphasis added). 1 U.S.C. XLVIII (1970).

The above constitutional provisions are all involved in the subject case.

5. The defendant, Anthony L. Broncucia was charged by a Denver Grand Jury Indictment with the crime of perjury. It was alleged that he committed perjury by testifying falsely before the Denver Grand Jury as follows:

**By Mr. Dill**
**Answered by Anthony L. Broncucia**

Q. Specifically, Mr. Broncucia, relating to the date of February 7th, did you see Mr. Griswold on that date?
A Well, if you can allow me to explain a little bit.
Q Yes, if you would, please.
A I don't particularly know whether that's the particular date. I know he was there on a

Saturday, but actually the date, I don't recall it, you know.

Q I see. What do you recall about whatever date it was that he was there?

A Well, they were there, and he had a party. I believe it was a birthday party for his girl friend or wife.

Q Would that be Linda Wilson?

A I don't know.

Q Could you describe that girl friend?

A I sure couldn't.

. . . . . .

Q Did you know any of the people there?

A Yes, some of them.

Q And who were the names that you recall?

A Robert Quintana was present, but I wasn't – I am divorced, and I get my child weekly, and I wasn't present at the party all day long or anything. I just –

. . . . . .

Q Do you recall what kind of a party it was specifically?

A It was a birthday party.

Q Now, let me make sure before we conclude that I understand your testimony. Your testimony is that on the date of the party in February 1970 – and you are not sure whether that's the 7th, but you are sure it's a Saturday –

A I'm sure it's on a Saturday, and I'm almost sure it's February. I guess I could be wrong and it could be the last Saturday of January or something like that, but –

Q But there was a party Mr. Griswold gave for some young lady and at this party you gave him a receipt before he left Mickey's Inn that date?



A Yeah.

Q And the receipt is not the same receipt as we have here today before you, Grand Jury Exhibit A?

. . . . . .

Q That you did give him a receipt on that date?

A I gave him a receipt on the day of the party.

Mr. Broncucia was also charged in the District Court with unlawfully conspiring and cooperating with Robert E. Griswold, John M. Rodriguez, Walter Ciari, George A. Pauldino, Robert Quintana, Linda K. Wilson (a/k/a Linda K. Tomeo), and Raymond M. Reidel to commit several acts of perjury at a Denver District Court extradition hearing concerning a diamond theft and before a Denver Grand Jury convened to investigate the commission of perjury by said persons at the extradition hearing. The charges against Mr. Broncucia were set forth in Count Nine and Count Ten of a Ten-Count indictment. Counts One through Eight were directed against the above-named parties.

Anthony Broncucia was the only defendant among the eight defendants charged herein who was not indicted for perjury at the Denver District Court extradition hearing. He therefore moved for severance and was granted a separate trial on the two counts of the indictment applicable to him. In addition to the Motion for Severance, the defendant also filed and argued prior to trial a Motion to Dismiss Counts Nine and Ten of the indictment on the basis that said counts were constitutionally insufficient, a Motion to Quash Count Ten on the grounds that said count was duplicitous, a Motion for Severance of Charges, and a Motion to Suppress the defendant's statements before the Denver Grand Jury (ff704-796). Each of the enumerated motions was denied by the District Court, and the defendant's case proceeded to trial on the charges of perjury before the Denver Grand Jury on July 14, 1972, and conspiracy to commit several acts of perjury at the extradition hearing on March 23, 1973, and before the Denver Grand Jury on May 9, 1972, May 23, 1972 and July 14,

1972. During the trial, the defendant moved for judgment of acquittal on both counts and renewed his Motion for Severance of Counts, all of which motions were denied by the District Court (ff2381-2456). The jury returned a verdict of guilty on both counts. It was from this judgment of conviction that the defendant appealed this case to the Colorado Supreme Court.

Defendant-petitioner's brief before the Colorado Supreme Court consisted of over 100 pages and dealt with fifteen separate and important legal issues. Since inadequate time was allotted for oral argument before the Colorado Supreme Court, only three of these legal issues were discussed in oral argument and in the written opinion rendered by said Court only two were considered. Thus, the opinion rendered by the Colorado Supreme Court in reversing the perjury conviction and affirming the conspiracy conviction failed to deal with the question of whether the District Court erred in refusing to suppress the defendant-petitioner's testimony before the Grand Jury. As will be set forth below, it is clear that the defendant-petitioner was a putative defendant under investigation for the conspiracy charge when he was called to testify before the Grand Jury. He was not, however, advised that he was under investigation for any crime and, consequently, was not advised of the nature of the charges for which he was being investigated. Also, defendant-petitioner was not fully advised of his constitutional rights in accordance with *Miranda v. Arizona,* 384 U.S. 436 (1966), when he appeared before the Grand Jury as a "putative" or "focused-on" defendant. In spite of this, his testimony before the Grand Jury was admitted for consideration by the jury at the District Court trial.

Defendant-petitioner forwards two arguments in support of his contention that the Colorado Supreme Court erred in not overruling the District Court's denial of defendant--petitioner's motion to suppress his testimony before the Grand Jury. Given the fact that investigation had been "focused" upon the defendant at the time of his testimony before the Grand Jury July 14, 1972, said testimony is inadmissible in that, first, defendant was not warned that his



own activities were a subject of the investigation, and second, defendant was not fully advised of his constitutional rights as set forth in *Miranda v. Arizona,* 384 U.S. 436 (1966)

The District Court delivered its holding that defendant was sufficiently advised on the assumption that Broncucia was a "focused-on" or "putative" defendant (f795). In addition, it would appear from the record that the prosecutor himself believed that in fact Broncucia was himself being actively investigated at the time of his Grand Jury testimony:

> MR. LITTLE:
>
> ....
>
> ... at the time of the Grand Jury's investigation, *a number of the defendants* in this particular matter, *including the defendant* here, were not arrested. *They were still under investigation....* (f725) (emphasis added).

Such an admission by the district attorney was a critical part of the argument that defendant was himself under investigation by the Grand Jury at the time of his testimony in *People v. Clifford,* 105 Colo. at 326, 98 P.2d at 277. Although in *Clifford* the Supreme Court found the district attorney's statement to be no such admission, it intimated that such an admission, together with the "method and manner of his interrogation before the grand jury, as appears from the transcript of defendant's testimony," are central in determining whether in fact the defendant was "focused-on" by the Grand Jury. Here the transcript of defendant's Grand Jury testimony and the prosecutor's admission show that, indeed, defendant Broncucia was himself being actively investigated at the time of his testimony.

The transcript of Broncucia's Grand Jury testimony, People's Exhibit A, clearly indicates that his actions themselves were the "center attraction" of the government's questioning. Broncucia's testimony related almost solely to the time, place and circumstances surrounding the birthday

party given by defendants sometime in early 1970 for Robert Griswold. The questioning throughout focused on Broncucia's involvement with the party and the receipt given for the party, and not merely on Griswold's participation in the party and the arrangements for it. At times the government's questions became flatly accusatory:

> Q: . . . did Mr. Griswold ever give you any money or ask you to prepare the receipt for his hearing?
>
> A: The only time he asked me to do anything for his hearing is if I would testify and he showed me this receipt.
>
> Q: I see. Did he ever give you any money to testify?
>
> A: No, he hasn't.
>
> (f2816)

See *People v. Vosburg*, 21 Misc. 2d 372, 193 N.Y.S. 2d 158 (1959), in which the New York Court of Appeals focused on two factors in the record in determining that defendant at the time of his Grand Jury appearance was a "putative" defendant: that the "main attention and emphasis" of the Grand Jury's questions "were directed to the actions of the defendant;" and moreover, that defendant's answers directly related to matters "under investigation and affecting him." 193 N.Y.S. 2d at 159-160.

It is likewise apparent here that when he appeared before the Denver Grand Jury on July 14, 1972, defendant Anthony Broncucia was a "putative" or "focused-on" defendant.

As indicated above, defendant-petitioner was not told that his own activities were a subject of the Grand Jury's investigation at the time of his testimony. It is clear that the rule in Colorado is that a "potential defendant before a grand jury" must be "fully advised *both* of his constitutional rights



*and* that he is the subject of the investigation." *People v. Austin*, 159 Colo. 445, 448, 412 P.2d 453 (1966) (emphasis added). *See also, People v. Clifford*, 105 Colo. 316, 322, 98 P.2d 272, 275 (1939). The Supreme Court's use of the conjunctive clearly indicates that defendant is entitled to a warning whether he is the subject of investigation apart from and in addition to advisement of his "constitutional rights," that is, those contained in *Miranda v. Arizona*. The Second Circuit Court of Appeals articulated the rationale behind such a requirement as follows:

> Unlike an arrested person for whom the *Miranda* warnings includes no similar advice, the grand jury witness does not necessarily know whether the accusatory process is about to center on him. His inability intelligently to consider invocation of his self-incrimination privilege is certainly enhanced by advice as to his status as a potential defendant.

*United States v. Pepe*, 367 F. Supp. 1365, 1368 (2d Cir. 1973) (defendant's Grand Jury testimony suppressed on other grounds). Colorado apparently believes that knowledge of any investigative scrutiny is so essential to intelligent exercise of the witnesses constitutional rights that such a warning is in itself mandatory.

Other states in addition to Colorado require that a putative defendant be warned that he is a subject of the Grand Jury investigation: "the target of a grand jury proceeding must be advised that he is a target *and* of his right not to incriminate himself, failing which an indictment based upon his testimony will be quashed." *State v. Williams*, 59 N.J. 493, 284 A.2d 172, 178 (1971) (emphasis added), *citing State v. Fary*, 19 N.J. 431, 117 A.2d 499 (1955); *State v. DeCola*, 33 N.J. 335, 164 A.2d 729 (1960); *in re Addonizio*. 53 N.J. 107, 248 A.2d 531 (1968). In *Fary, supra*, Judge (now United States Supreme Court Justice) William J. Brennan, Jr. noted that:

> The rationale of these decisions is that where the investigation is in fact a proceeding against the

> witness, or being ostensibly a general investigation is, in fact, as shown by the circumstances and evidence, a proceeding against him, then there is a gross encroachment upon the witness' privilege if he be subpoenaed before the body, sworn and questioned, though he makes no claim of the privilege. *Fary, Supra,* 117 A.2d 503.

New York also has a long line of cases involving testimony of putative defendants before a Grand Jury. *People v. Rauch,* 140 Misc. 691, 251 N.Y.S. 454 (1931) (indictment dismissed where it was clear the Grand Jury was proceeding against defendant); *People v. Vosburg,* 21 Misc. 2d 372, 193 N.Y.S. 2d 158 (1959); *People v. Werkes,* 46 Misc. 2d 1020, 261 N.Y.S. 2d 726 (1965). *See also, State v. Corteau,* 198 Minn. 433, 270 N.W. 144 (1936).

In addition, two states have recently decided cases stating that a "target" of a Grand Jury investigation is entitled to know the "charges against him then under consideration," *State v. Ruggieri,* 19 Utah 2d 216, 429 P.2d 969, 973 (1967), and the evidence against him when the state suspected that the testimony he was about to give was false, *State v. Redinger,* 64 N.J. 41, 32 A.2d 129 (1973). Furthermore, the sanction in both cases affected an indictment for perjury in giving the testimony. In *Ruggieri,* the court upheld suppression of defendant's testimony before the Grand Jury as it related to an indictment for perjury. In *Redinger,* one Adrian was charged with careless driving on June 2. Redinger appeared as a witness at Adrian's trial on June 7, to say that he and not Adrian had been driving the car. Adrian was then dismissed and Redinger charged with careless driving. On June 9, police obtained statements from two girls that in fact Adrian and not Redinger had been driving the car. At Redinger's trial on June 13, the Judge, who was aware of the statements of the two girls, put Redinger under oath and reminded him of the state's perjury laws before accepting his plea of guilty. Later that day Redinger was charged with perjury by criminal complaint; on June 25, Grand Jury returned an indictment against Redinger, one count being



perjury at his June 13 trial. This count the Supreme Court dismissed, saying:

> . . . we think that in the interest of fundamental fairness the State should be barred from charging Redinger with having committed perjury on June 13. We hold no brief for Redinger if in fact he perjured himself on that date. However, the State should have no part in any kind of trickery. What happened at the hearing on June 13 smacks of entrapment. The police by that time had statements from two witnesses that Adrian was actually driving the car. This evidence was not disclosed to Redinger at the hearing. Instead, in effect, he was allowed to walk into a waiting charge of perjury. This was not fair play.

The remedy, then, in that defendant Broncucia was in fact a putative defendant yet was not warned that he himself was under investigation, is that the remaining conspiracy conviction stemming from Count Ten be reversed. *See, State v. Redinger, supra,* (charges of perjury before tribunal where defendant's rights were violated were dismissed); *People v. Clifford, supra; People v. Rauch, supra; State v. DeCola, supra; United States v. Pepe, supra,* discussing *United States v. Lawn,* 115 F. Supp. 674 (S.D.N.Y. 1953) and *Lawn v. United States,* 355 U.S. 339 (1958).

Finally, defendant-petitioner was not fully advised of his constitutional rights in accordance with *Miranda v. Arizona, supra,* when he appeared before the Grand Jury as a "putative" or "focused-on" defendant. While the District Court assumed that Broncucia was a "focused-on" defendant in his appearance before the Grand Jury, it conceded that Broncucia's advisement was "not ideally consistent with the four corners of *Miranda*" (f790) in that defendant was not warned that anything he said could and might be used against him, and nonetheless concluded that defendant was sufficiently advised of his constitutional rights and that his waiver of these rights was therefore a free, knowing and intelligent waiver.

Defendant-petitioner contends that as a putative defendant before the Grand Jury he was entitled to a warning or advisement embodying the "full panoply" of *Miranda* rights, *including* especially the warning that anything defendant said could and might be used against him. Therefore, defendant-petitioner argues that the District Court committed error in holding that even though Broncucia was not specifically warned that anything he said could be used against him, it could be "reasonably inferred" from the advisement concerning his right against self-incrimination and his right to counsel "that the defendant knew that anything he said before the Grand Jury could and would be used against him." (f789). Moreover, defendant-petitioner contends that the District Court misconstrued the remedy to such a faulty advisement and misapplied *People v. Spencer*, ____ Colo. ____, 512 P.2d 260 (1973) – as a result, although Broncucia's Grand Jury testimony might not insulate him from a charge of perjury based on that testimony, such testimony relating to "prior acts" should have been suppressed and the indictment based upon such testimony as to prior acts (that is Count Ten, the conspiracy charge) should have been dismissed. Similarly, defendant-petitioner argues that the Colorado Supreme Court committed error in failing to overrule the District Court in the above respects.

A wealth of recent cases, both State and Federal, have found that a putative defendant before the Grand Jury is entitled to an advisement of his constitutional rights. In reviewing these cases defendant-petitioner will focus on the scope of the advisement, the consequences of a faulty advisement (*i.e.*, whether the testimony is merely to be suppressed or the indictment itself is to be dismissed), and application of the remedy (*i.e.*, whether the remedy is to be applied to a prosecution for perjury before the Grand Jury after the faulty advisement or solely to a prosecution for "past acts" testified to before the Grand Jury).

The United States Court of Appeals for the Second Circuit does not appear to have considered the issue. However, a District Court opinion in the Second Circuit has stated in *dictum* that the "full panoply" of constitutional rights is to



be given a potential defendant. The Court held that no error was committed in not advising defendant of his rights in the absence of a warning does not insulate the witness from the consequences of committing perjury before the Grand Jury. *United States v. Andrews*, 370 F. Supp. 365, 371 (D. Conn. 1974). The Third Circuit does not appear to have considered the issue concerning a "putative defendant." having held only that an ordinary witness has no legal expectation of such an advisement. *United States v. DiMichele*, 375 F.2d 959 (3d Cir.), *cert. denied*, 389 U.S. 838 (1967); *see also, United States v. Lardieri*, 497 F.2d 317 (3d Cir. 1974). No cases touching the issue could be found from the Fourth Circuit.

The Court of Appeals for the Fifth Circuit very recently decided that a prospective defendant appearing before a Grand Jury was entitled to a full advisement of his *Miranda* rights, specifically including the right to be warned that anything he said could and would be used against him. Finding such warnings inadequately given, the court ordered that his testimony before the Grand Jury be suppressed, *both* as it related to an indictment for past acts testified to before the Grand Jury *and* as it related to a charge that the defendants perjured themselves before the Grand Jury after the advisements were adequately given. *United States v. Mandujano*, 496 F.2d 1050 (5th Cir. 1974), and *United States v. Rangel*, 496 F.2d 1059 (5th Cir. 1974) *affirming United States v. Rangel and Mandujano*, 365 F. Supp. 155 (W.D. Tex. 1973). Both defendants had been charged with attempt to distribute heroin, and perjury before the Grand Jury. The attempts allegedly took place before their Grand Jury testimony when both defendants purportedly made contact with undercover agents. Before the Grand Jury both defendants denied any attempts to sell heroin and denied that they had even been solicited by any undercover agents to sell heroin. The court found that the Grand Jury questioning was in fact a "continuing investigation" into the activities of the defendants, that the Grand Jury questioning deliberately delved into circumstances of contacts known to the prosecutor to have taken place between defendants and government agents, and as such the Grand Jury questioning smacked of entrapment.

The court in *Rangel* and *Mandujano* held that such "putative defendants" were entitled to be warned (1) of the right to remain silent in regard to incriminating questions, (2) that they had a right to consult with their own or appointed counsel, and (3) "that any testimony given might be used against them in a court of law." 365 F. Supp. at 160-61. With regard to the last requirement the court discussed *United States v. Corallo*, 413 F.2d 1306 (2d Cir.), *cert. denied* 396 U.S. 958 (1969), observing that:

> In addition, the witness in *Corallo* was cautioned that if the questions were answered, they might be used against him in a court of law. In all fairness, the court believes that such a warning would have been not only instructive, but highly appropriate in the circumstances of this case. 365 F. Supp. at 160.

Rather than dismiss the indictment, the court chose to suppress defendant's Grand Jury testimony as it related to both counts, that is, as substantive evidence of the attempt charge, and as evidence of perjury:

> One obvious purpose of *Miranda* was to avoid putting a defendant to the Hobson's choice of either incriminating himself or lying. In the case of the putative defendant who has not been properly warned of his rights, the only choice available to him apparently lies between incriminating himself or giving false testimony. *Miranda* would be vitiated if the government, by failing to give the warnings, could force the witness to guess as to which type of testimony is properly protected under the Fifth Amendment. In that event, an incorrect guess by such a witness would clearly constitute a situation in which he would have been 'compelled to be a witness against himself.'

The Sixth Circuit Court of Appeals has likewise held that the full spectrum of constitutional rights must be afforded a "virtual defendant" testifying before a Grand Jury. *United States v. Luxenberg*, 374 F.2d 241 (6th Cir. 1967); *United States v. Fruchtman*, 282 F. Supp. 534 (N.D. Ohio 1968), *cert. denied* 400 U.S. 849 (1970). In *Luxenberg*, the court held that the advisement must include the right to remain silent as to answers that might incriminate the witness, and a warning that anything the witness said could be used against him. In *Fruchtman* the court chose the remedy of suppressing the Grand Jury testimony as it related to a charge concerning prior acts testified to by the witness before the Grand Jury.



The Seventh Circuit, while holding that failure to give a Grand Jury witness an advisement of his constitutional rights does not bar a prosecution for perjury before that body, expressly withheld judgement concerning incriminating testimony relating to "past acts." *United States v. DioGiovanni*, 397 F.2d 409, 412 (7th Cir.), *cert. denied* 393 U.S. 924 (1968). However, one district court in the Seventh Circuit has decided the question left open in *DiGiovanni*, holding that an indictment relating to past acts testified to before the Grand Jury must be dismissed where no *Miranda* warnings were given. *United States v. Kreps*, 349 F. Supp. 1049 (W.D. Wis. 1972). In *Kreps* the government contended that defendant was adequately protected because he was accompanied to the Grand Jury by an attorney; he was asked whether he had been advised by the attorney concerning the appearance and responded "yes;" and he was allowed a recess to consult with his attorney before responding to a question. The court noted that while the government's contention was reasonable, it must be rejected:

> It would be a simple prophylactic rule, easily complied with, that before grand jury testimony is elicited from one in Kreps' position, the *Miranda* warnings be given. 349 F. Supp. at 1053.

The court concluded that the proper remedy was dismissal of the indictment and not merely exclusion of defendant's Grand Jury testimony from evidence:

> I cannot agree that [exclusion of Kreps' testimony from evidence] is a sufficient consequence. The task of administering the 'fruit of the poisonous tree'

> doctrine in such a situation would be difficult in the extreme. But more important, under the constitution, Kreps could not have been protected against in the absence of [dismissal of the] indictment. We are left to speculate whether the grand jury's decision to indict Kreps was affected in significant degree by the testimony he gave in its presence. 349 F. Supp. at 1054.

While the Eighth Circuit Court of Appeals has itself not decided the issue, one district court in the Eighth Circuit has held that a witness before the Grand Jury, and especially a witness under investigation, has to be given a proper advisement. *In re Kelley*, 350 F. Supp. 1198 (E.D. Ark: 1972). There the court held that:

> . . . a witness before the grand jury, and especially an employee of a company or corporation under investigation by the grand jury, *must be warned* that he might be prosecuted and that his testimony might be used against him and that he has the right not to incriminate himself. If he is not so warned, that testimony and its fruits may not be used against him. 350 F. Supp. at 1200 (emphasis in original).

The remedy applied by the court in *In re Kelley*, then, is apparently not to dismiss the indictment but to suppress the testimony given before the Grand Jury.

The Ninth Circuit is the only Circuit rejecting the notion that *Miranda* is applicable to the appearance of a "virtual" or "putative" defendant before a Grand Jury. *Gollaher v. United States*, 419 F.2d 520 (9th Cir.), *cert. denied* 936 U.S. 960 (1969). There the court held that defendant's Grand Jury testimony could be used both for impeachment purposes and as substantive evidence in that even though a subpoenaed witness, because he was not in *police custody*, *Miranda* was not applicable. However, the court did not make it clear whether any of the rights *spoken of* in *Miranda*, as opposed to the whole *Miranda* warning, would be applicable if



defendant were a virtual defendant. In addition, the court noted that the defendant there had in fact been adequately advised of his rights against self-incrimination.

In addition to the Federal Courts, several state courts have considered the question of warnings to be given to a putative defendant testifying before a Grand Jury. In *State v. Ruggieri*, 19 Utah 2d 216, 429 P.2d 969 (1967), defendant was a "target" of the Grand Jury investigation, and as such was entitled to the full *Miranda* advisements, including a statement of "the charges against him then under consideration." 429 P.2d at 973. Failing these warnings, it was held proper for the trial court to suppress defendant's testimony before the Grand Jury as it related to an indictment for perjury in his testimony. The court in *Ruggieri* reasoned that one being investigated for a crime is not just a witness, and that questioning him without the proper advisements approaches entrapment:

> To fail to so warn one so being investigated is to entrap him and to violate his constitutional privilege against self-incrimination. 429 P.2d at 973.

On this issue of disallowing testimony even as it relates to the charge of perjury when there is a situation approaching entrapment, *see also State v. Redinger*, discussed above. Oklahoma has also held that testimony elicited from the "target" of a Grand Jury investigation without the defendant being warned of his constitutional rights warrants dismissal of the indictment based on the defendant's testimony as to his past acts. *O'Neal v. State*, 468 P.2d 59 (Okl. Cir. 1970).

Since the Colorado Supreme Court has already reversed the perjury conviction stemming from Count Nine of the indictment, defendant-petitioner urges that Count Ten be dismissed. First, the facts and circumstances, including the record of the manner of defendant-petitioner's questioning before the Grand Jury and the prosecutor's admissions (discussed above), of Broncucia's testimony before the Grand Jury indicate that he was a "putative," "potential," or "prospective" defendant actually under investigation at that

time. Second, as conceded by the trial court, defendant-petitioner was not warned that he was under investigation nor was he warned that anything he said could and might be used against him. Third, such a prospective defendant has a right to be so advised. *United States v. Mandujano, supra; United States v. Rangel, supra; United States v. Kreps, supra; In re Kelley, supra; State v. Ruggieri, supra; State v. Williams, supra; O'Neal v. State, supra.* As the Fifth Circuit stated in *Mandujano* and *Rangel,* one obvious purpose of *Miranda* was to avoid putting a defendant to the "Hobson's choice of either incriminating himself or lying." 365 F. Supp. at 163. Or as the Utah Supreme Court put it, defendant should not be forced to either " 'confess and be hanged' or to swear a lie" *Ruggieri, supra,* 429 P.2d at 975. If one of the purposes of the *Miranda* warnings is that defendant fully realize the consequences of his alternative courses of action, then when elements of the *Miranda* warnings which were designed to allow action on these alternatives be done knowingly and intelligently (such as knowledge that anything he said could and would be used against him, and implicitly, knowledge that the focus of the investigation was on defendant) are absent, the consequent testimony choosing either Scylla or Charybdid should be suppressed. This should be so particularly where, as here, the facts and circumstances of the investigation demonstrate that the questioning was so focused on the defendant as to amount to entrapment. *See, State v. Ruggieri, supra; State v. Redinger, supra. See also, People v. Spencer,* ____ Colo. ____ 512 P.2d 260 (1973). There the Supreme Court held that although a putative defendant has a right to a warning of privilege against self-incrimination before the Grand Jury, the right relates only to past acts, and not to present or future acts, as for example, perjury before the Grand Jury. Nonetheless, *Spencer* is distinguishable from the instant case in that the Spencers themselves demanded the Grand Jury investigation, and that furthermore, testimony demonstrated that it was not until after the Spencers had completed their testimony that the investigation focused on them: the element of "entrapment" before the Grand Jury was wholly lacking.

In the instant case, Count Ten, the conspiracy count, was based upon the "past acts" which defendant testified to



at the Grand Jury investigation, and, as such, was not covered by the rule in *Spencer.* The cases cited above have uniformly applied their sanctions for failure to properly advise to indictments for "past acts" based upon testimony as to these "past acts." Lastly, defendant urges that whatever counts be affected, that the remedy be dismissal of the count or counts, rather than merely suppression of the testimony as evidence usable at the trial of the count. *See, Kreps, supra,* wherein the court pointed to the impossibility of administering the "fruit of the poisonous tree" doctrine should the evidence merely be suppressed and the indictment be allowed to stand.

The federal questions sought to be reviewed herein were raised in pre-trial oral argument before the District Court. In support of their Motion to Suppress defendant-petitioner's statements before the Denver Grand Jury, defense counsel stated as follows at ff. 766-769:

> "But, in this case Mr. Broncucia was taken and advised of his rights or his so-called rights. They omitted to tell him one thing, your Honor, and that is, he was under investigation for conspiracy to commit perjury and the perjury of March 23rd. While they advised him he had a right not to testify and had a right to consult with a lawyer and that anything he said might be used against him, he wasn't told that he was under investigation himself; and it is perfectly obvious from a bill of particulars that he was under investigation. He was told that the Grand Jury is investigating the whereabouts of Mr. Robert Edward Griswold, which we submit, your Honor, he should have been told we are investigating a criminal conspiracy in which there is certain evidence in which you might be involved and your duplicity in that. It is obvious they had that at the time Mr. Broncucia testified. Now, we feel that the Grand Jury must give the same Miranda warnings as required in a police custodial procedure. The witness finds himself in the circumstances very similar. He is required to be here; he is commanded; he is subpoenaed. He is put in a

> relatively awkward position and, as the transcript will bear out, a completely hostile environment and deprived of the presence of counsel. Mr. Broncucia, as the record will show in this case, was never told that he was being investigated. He was told that they were investigating the whereabouts of Mr. Robert Edward Griswold."

In further support of their Motion to Suppress defendant-petitioner's statements before the Denver Grand Jury, defense counsel specifically focused upon the following issue at f.470:

> "There is a question as to whether it would be admissible under the Fifth Amendment, or whether it might be considered self-incrimination in violation of that amendment if it were offered in support of the conspiracy to commit the perjury charge."

The above-described federal questions sought to be reviewed were passed upon by the District Court at ff. 784-796. Pertinent sections of the record delineating the Court's response to said questions are as follows:

> "The Court believes that while the advisement is not ideally consistent with the four corners of Miranda, nevertheless, the defendant, based upon the record, fully understood his Miranda rights and fully understood his privilege against self-incrimination and his right to refuse to answer any incriminatory questions and further understood that any responses he did make could and would be used against him." (f. 790).
>
> "There is an absence of evidence at this point in the record that the defendant was at that time a putative defendant or suspicion had focused on him to the extent that perhaps further advisement might have been in order, but the Court has no evidence before it at this point to conclude that the defendant was a focused-on defendant. However, so the record will be complete, even assuming the



> defendant was a putative defendant, the Court believes that the advisement given to him at that time was an adequate advisement to properly apprise him of his constitutional rights." (ff. 794-795).
>
> "The Court would conclude that the defendant was properly advised of his constitutional rights of self-incrimination and his privilege to refuse to answer any questions." (f. 787).
>
> "And from the record as made, the Court can only conclude that the defendant freely and intelligently waived those rights and proceeded to testify before the Grand Jury. So, for these reasons, the motion to suppress will be denied." (ff. 795-796).

The Federal questions sought to be reviewed herein were raised in the Colorado Supreme Court by way of appeal from the District Court In And For The County of Denver, State of Colorado. Said federal questions are fully set forth in the brief of Anthony L. Broncucia, defendant-petitioner herein, which was timely filed with the Colorado Supreme Court (pp. 38-51). The summary of defendant-petitioner's argument concerning these federal questions is contained in the statement of the case. (supra). As previously indicated, defendant-petitioner's brief before the Colorado Supreme Court consisted of over 100 pages and dealt with fifteen separate and important legal issues. As inadequate time was allotted for oral argument before the Colorado Supreme Court, only three of these legal issues were discussed in oral argument and the written opinion rendered by said Court failed to deal with the question of whether the District Court erred in refusing to suppress the defendant-petitioner's testimony before the Grand Jury. Thus, neither of the federal questions presented for review and set forth in paragraph 3 herein were expressly passed upon by the Colorado Supreme Court.

6. Pursuant to Rule 19(1) (a) of the Revised Rules of the Supreme Court of the United States, a review on writ of certiorari may be considered "[w]here a state court has decided a federal question of substance not theretofore deter-

mined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." U.S. Sup. Ct. Rule 19(1) (a), 28 U.S.C.A. 30. The Supreme Court of the United States has never before determined the substantial federal question of whether a state Grand Jury must fully advise a "putative" or "focused-on" defendant of his constitutional rights in accordance with *Miranda v. Arizona,* 384 U.S. 436 (1966). Said question is substantial in that the U.S. Constitutional Amendment V extends a privilege against self-incrimination to defendants in criminal cases. Defendant-petitioner submits that his constitutionally guaranteed privilege against self-incrimination has been violated by the Grand Jury's failure to give the same Miranda warnings as required in police custodial interrogations. Moreover, the Courts of Appeals in the U.S. are in conflict with each other concerning the question of whether *Miranda* is applicable to the appearance of a "virtual" or "putative" defendant before a Grand Jury and said question should be finally settled by the Supreme Court of the United States. Closely related to the U.S. Constitutional Amendment V privilege against self-incrimination is the question of whether a state Grand Jury must warn a putative defendant that he is a subject of the Grand Jury investigation and advise him of the nature of the charges for which he is being investigated. Again, the Supreme Court of the United States has not yet determined this issue and the state courts throughout the country are in conflict concerning the proper resolution of the question. As a result of the Colorado Supreme Court's decision herein, defendant-petitioner has further been deprived of liberty without due process of law in violation of U.S. Constitutional Amendment XIV §1. In light of the above substantial federal questions not heretofore determined by the Supreme Court of the United States, defendant-petitioner's writ of certiorari should be granted in accordance with Rule 19(1) (a) of the Revised Rules of the Supreme Court of the United States.

Respectfully submitted,

EDWARD B. TOWEY



EDWARD B. TOWEY
Attorney for Defendant-Petitioner
1701 West 72nd Ave., Suite 210
Denver, Colorado 80221
Telephone: (303) 428-7411

JOHN D. MACFARLANE, Attorney General
JEAN E. DUBOFSKY, Deputy Attorney General
JAMES W. WILSON, Assistant Attorney General
1365 Logan Street
Denver, Colorado 80203
Telephone: (303) 892-2107

DALE TOOLEY, District Attorney,
BROOKE WUNNICKE, Chief Appellate Deputy
District Attorney,
West Side Court Building
1460 Kalamath
Denver, Colorado 80204
Telephone: (303) 297-5824

Attorneys for Plaintiff-Respondent.

IN THE SUPREME COURT

OF

THE UNITED STATES

No. 26557

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF COLORADO, | ) | |
| Plaintiff-Respondent, | ) | AFFIDAVIT OF SERVICE OF PETITION FOR WRIT OF CERTIORARI |
| v. | ) | |
| ANTHONY L. BRONCUCIA, | ) | |
| Defendant-Petitioner. | ) | |

AFFIDAVIT OF ELIZABETH L. McGANN

STATE OF COLORADO )
) ss.
County of Adams )

Elizabeth L. McGann, being first duly sworn on her oath, deposes and says:

1. All parties required to be served by Rule 33(1) of the Revised Rules of the Supreme Court of the United States have been served by affiant with the above-captioned Petition For Writ of Certiorari.

2. As affiant is not a member of the bar of the Supreme Court of the United States, proof of the aforementioned service by affiant is hereby shown in accordance with Rule 33(3)(c).

3. Affiant has served the People of the State of Colorado, adverse party herein, by mailing three copies of the above-captioned Petition for Writ of Certiorari to each of the

following named attorneys for Plaintiff-Respondent by depositing the same in a United States post office, with first class postage prepaid, addressed to the attorneys of record for Plaintiff-Respondent at their post office addresses:

JOHN D. MacFARLANE, Attorney General,
JEAN E. DUBOFSKY, Deputy Attorney General,
JAMES W. WILSON, Assistant Attorney General,
1365 Logan Street
Denver, Colorado

DALE TOOLEY, District Attorney,
BROOKE WUNNICKE, Chief Appellate Deputy
District Attorney,
West Side Court Building
1460 Kalamath
Denver, Colorado 80204

Attorneys for Plaintiff-Respondent.

FURTHER, Affiant Sayeth Not.

Dated this day of January, 1976.

/s/ ELIZABETH L. McGANN

Subscribed, sworn to and acknowledged before me this day of January, 1976, by Elizabeth L. McGann.

/s/ Monica Casillon
Notary Public

My commission expires: August 16, 1978.



**EXHIBIT "A"**

**NO. 26557**

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF COLORADO | ) | Sept. 15,1975 |
| Plaintiff-Appellee, | ) | |
| v. | ) | |
| ANTHONY L. BRONCUCIA, | ) | |
| Defendant-Appellant. | ) | |

**Appeal from the District Court**

**of the**

**City and County of Denver**

**Honorable Joseph R. Quinn, Judge**

**EN BANC** **JUDGMENT AFFIRMED IN PART AND REVERSED IN PART**

John D. MacFarlane, Attorney General,
Jean E. Dubofsky, Deputy Attorney General,
James W. Wilson, Assistant Attorney General,

Dale Tooley, District Attorney,
Brooke Wunnicke, Chief Appellate Deputy District Attorney,

Attorneys for Plaintiff-Appellee,

Edward B. Towey,
Ruthanne Gartland,

Attorneys for Defendant-Appellant,

MR. JUSTICE GROVES delivered the opinion of the Court.

This is a companion case to *People v. Ciari,* Supreme Court No. 26134, ____ Colo. ____, ____ P.2d ____ , and *People v. Quintana,* Supreme Court No. 26181, ____ Colo. ____ , ____ P.2d ____ , announced contemporaneously with this opinion. Defendant appeals from convictions of perjury, and conspiracy to commit perjury. We reverse as to the perjury conviction and affirm as to the conspiracy conviction.

An extradition hearing was held upon one Griswold's application for a writ of habeas corpus contesting Griswold's extradition to Nevada for criminal proceedings against him involving an alleged "diamond switch." The evidence shows that the defendant gave Griswold a receipt for expenses resulting from a birthday party which was supposed to have been held at the defendant's place of business, Mickey's Inn, in Denver on February 7, 1970. The receipt was introduced at the extradition hearing for the purpose of showing Griswold's presence in Denver on the day of the alleged diamond switch. Although defendant declined to testify at the extradition hearing, he did testify at subsequent grand jury proceedings. This testimony, the People allege, corroborated the testimony given by alleged co-conspirators at the extradition hearing. all of which supported Griswold's alibi.

The resulting grand jury indictment, alleged that defendant committed perjury by testifying falsely before the Denver Grand Jury as follows:

"Q Specifically, Mr. Broncucia, relating to the date of February 7th, did you see Mr. Griswold on that date?

"A Well, if you can allow me to explain a little bit.

"Q Yes, if you would, please.

"A I don't particularly know whether that's the particular date. I know he was there on a Saturday, but actually the date, I don't recall it, you know.



"Q I see. What do you recall about whatever date it was that he was there?

"A Well, they were there, and he had a party. I believe it was a birthday party for his girl friend or wife.

"Q Would that be Linda Wilson?

"A I don't know.

"Q Could you describe that girl friend?

"A I sure couldn't.

. . . . . .

"Q Did you know any of the people there?

"A Yes, some of them.

"Q And who were the names that you recall?

"A Robert Quintana was present, but I wasn't – I am divorced, and I get my child weekly, and I wasn't present at the party all day long or anything. I just –

. . . . . .

"Q Do you recall what kind of a party it was specifically?

"A It was a birthday party.

"Q Now, let me make sure before we conclude that I understand your testimony. Your testimony is that on the date of the party in February 1970 – and you are not sure whether that's the 7th, but you are sure it's a Saturday –

"A I'm sure it's on a Saturday, and I'm almost sure it's February. I guess I could be wrong and it could be the last Saturday of January or something like that, but –

"Q But there was a party Mr. Griswold gave for some young lady and at this party you gave him a receipt before he left Mickey's Inn that date?

"A Yeah.

"Q And the receipt is not the same receipt as we have here today before you, Grand Jury Exhibit A?

. . . . . .

"Q That you did give him a receipt on that date?

"A I gave him a receipt on the day of the party."

I

Defendant contends that the perjury charge failed to set forth with sufficient specificity the falsity of the defendant's statements so as to enable him to prepare his defense. We agree.

The device by which the defendant was charged with perjury in the indictment was a verbatim partial transcript of the defendant's actual testimony before the grand jury. There was no averment of fact to demonstrate the falsity of the testimony on which the charge was based. The failure to aver the true facts has been held to be proper when the truth of the disputed matter was clear by "necessary implication" so that the defendant will be apprised of the reasons for his statements being charged as false. *People v. Mazza,* 182 Colo. 165, 511 P.2d 885 (1973). Here, however, in the light of the defendant's equivocations and the failure of the People to prove the falsity of the defendant's equivocal testimony, his conviction of perjury cannot stand.



II

The defendant asserts that the charge in Count Ten is fatally defective in that it is duplicitous, *i.e.,* it charges two separate and distinct crimes of conspiracy in one count. *See Marrs v. People,* 135 Colo. 458, 312 P.2d 505 (1957). Count Ten charged a conspiracy to commit perjury between February 7, 1970, and August 1, 1973. He contends that Count Ten in fact charges two separate and distinct conspiracies: one, to commit perjury at the extradition hearing, and, two, to commit perjury during the grand jury proceedings. He argues that the object of the first conspiracy was to prevent the extradition of Griswold, while the object of the second conspiracy, if there was one, must have been to avoid criminal prosecution.

In a prosecution for conspiracy, considerable latitude is allowed because of the inherent problems of proof involved in proving a crime, the veil around which is secrecy. This court, in *People v. Incerto,* 180 Colo. 366, 505 P.2d 1309 (1973), stated:

> "Since conspiracy is a crime that is born in secrecy and bred in the alleys of deceit, it is often impossible for the prosecution to define the four corners of a conspiracy, either as to members or as to objects. Often, the prosecution cannot determine the extent of a conspiracy or the identity of the members of the conspiracy at a particular time until all the evidence is in."

In this case, as in *People v. Incerto, supra,* the defense was not surprised by the proof, nor were the substantial rights of the defendant affected, and thus reversible error did not occur.

The defendant made a motion for a bill of particulars as to Count Ten, which motion was granted. The resulting bill of particulars set forth that the defendant executed and delivered a receipt dated February 7, 1970, and attended meetings between the co-conspirators, all before the date of the

extradition hearing. This gave the defendant adequate notice as to the charge the People would attempt to prove – a conspiracy to commit perjury at the extradition hearing.

Included in the bill of particulars, was the allegation that the defendant gave false testimony before the Grand Jury on July 14, 1972. This statement was not improperly included against the defendant as it tended to show his participation in the conspiracy, even though the object of the conspiracy charged (the defeat of the extradition of Griswold) had by that time failed.

Moreover, the court instructed the jury that the conspiracy charge related to the extradition hearing, thereby avoiding the possibility that the defendant could have been convicted of conspiracy to commit perjury before the Grand Jury.

We find no substantial prejudice in the charge or in the instruction and, therefore, affirm.

The judgment is reversed as to perjury and is affirmed as to the conspiracy conviction, and the cause is remanded for disposition consonant with the views expressed in this opinion.

MR. JUSTICE ERICKSON recuses himself.



**EXHIBIT "A"**

**STATE OF COLORADO, ss.**
**IN THE SUPREME COURT THEREOF.**
**THE PEOPLE OF THE STATE OF COLORADO.**

**To the District Court of City and County of Denver and State of Colorado, Greeting:**

**WHEREAS, lately in the District Court of City and County of Denver State aforesaid, in a certain cause therein pending between The People of the State of Colorado, Plaintiff, and Anthony L. Broncucia, Defendant, the judgment of said District Court in said cause rendered was against the said defendant.**

**AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, as an appeal from said District Court.**

**AND WHEREAS, at the September Term of our Supreme Court, in the year of our Lord one thousand nine hundred and seventy-five, the said cause came on to be heard before our said SUPREME COURT on the 15th day of September, A.D. 1975, (the same being one of the Juridical days of said term) and the following proceedings were had and entered of record in said cause, to-wit:**

| | | |
|---|---|---|
| The People of the State of Colorado, Plaintiff-Appellee, | ) | Appeal from the District Court City and County of Denver |
| No. 26557 vs. | ) | |
| Anthony L. Broncucia, Defendant-Appellant. | ) | (68127) |

**This cause having been brought to this court as an appeal to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of**

the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, the court now being sufficiently advised in the premises, it is therefore ordered and adjudged that the judgment of said District Court be, and hereby is, affirmed as to the conspiracy conviction and reversed as to perjury, and the cause be remanded to said District Court for disposition consonant with the views expressed in the opinion of the court on file.

Now, Therefore, this cause is remanded to you, the said District Court, in and for the said City and County of Denver and State aforesaid, that such further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein.

WITNESS the HONORABLE EDWARD E. PRINGLE, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City of Denver, this 20th day of October, A.D. 1975.

RICHARD D. TURELLI,
Clerk Supreme Court.

By Florence Walsh
Deputy.



**EXHIBIT "B"**

NO. 26557

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, | ) | |
| v | ) | PETITION FOR REHEARING |
| ANTHONY L. BRONCUCIA, Defendant-Appellant. | ) | |

Appeal from the District Court

of the

City and County of Denver

Honorable Joseph R. Quinn, Judge

EN BANC

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART

MR. JUSTICE GROVES delivered the opinion of the Court.

EDWARD B. TOWEY
Attorney for Defendant-Appellant
1701 West 72nd Ave., Suite 210
Denver, Colorado 80221
Telephone: 428-7411

COMES NOW the Defendant-Appellant and petitions the Court for a rehearing for the following reasons:

1. It is submitted that an inadequate time was allotted for oral argument. This case was treated as a companion case to that of Walter Ciari and Robert Quintana. At the request of legal counsel for Ciari the cases were set for oral argument on the same day, and at the request of the same attorney, H. Earl Moyer, this case was set for oral argument first, although it had been tried months later and involved substantially different and much more difficult legal questions. Our brief before this Court consisted of over 100 pages and dealt with fifteen separate and important legal issues. Yet, in oral argument only three were discussed and in the written opinion rendered by this Court only two were considered. It is hereby requested that an additional oral argument be granted so that the Defendant-Appellant may be fairly heard with respect to each of the issues which relate to the conspiracy charge and which were not the subject of oral argument nor the opinion rendered by this Court. It is the intention of this paragraph to incorporate by reference each of the issues raised in the brief of Defendant-Appellant.

2. The opinion rendered by this Court in reversing the perjury conviction and affirming the conspiracy conviction failed to deal with the question of whether the trial of the two charges should have been severed. The prejudice to the Defendant seems apparent in a joint trial of two essentially separate charges. This Court's opinion held that the conspiracy count related to the Extradition Hearing on March 23, 1972. The perjury count which was joined for trial related to the Defendant's testimony before a Grand Jury on July 14, 1972. It is submitted that a joint trial of these two charges was not justified under the provisions of Rule 8(a) of the Colorado Rules of Criminal Procedure.

3. This Court's opinion did not deal with the significant question raised in the Defendant-Appellant's brief contending that the trial court erred in refusing to suppress the Defendant's testimony before the Grand Jury. It was clear that the Defendant was a putative Defendant under investigation for



the conspiracy charge when he was called to testify before the Grand Jury. He was not, however, advised that he was under investigation for any crime and, consequently, was not advised of the nature of the charges for which he was being investigated. In spite of this, his testimony before the Grand Jury was admitted for consideration by the jury at the trial.

4. The opinion of the Court did not deal with the procedural due process issues involved in the in-court sanctioned in-camera lineup.

5. The opinion did not deal with the hearsay nature of the testimony presented against the Defendant through the witness, Linda Tomeo. It is submitted that the case of *Kotteakos v. United States*, 328 U.S. 750 (1946) was directly in point. A substantial portion of the Defendant-Appellant's brief was devoted to this issue and yet it was not discussed or recognized in the opinion of the Court.

WHEREFORE, the Petitioner prays that this Honorable Court grant a rehearing of its decision in this matter.

Respectfully submitted,

EDWARD B. TOWEY

Attorney for Defendant-Appellant
1701 West 72nd Ave., Suite 210
Denver, Colorado 80221
Telephone: 428-7411

**EXHIBIT "B"**

**IN THE SUPREME COURT**

**OF THE**

**STATE OF COLORADO**

| | | |
|---|---|---|
| The People of the State of Colorado, | ) | |
| | ) | Appeal from the |
| Plaintiff-Appellee, | ) | District Court |
| | ) | of |
| 26557 v. | ) | City and County |
| | ) | of |
| Anthony L. Broncucia, | ) | Denver |
| | ) | |
| Defendant-Appellant. | ) | |

On consideration of the petition of defendant-appellant for rehearing in said cause, it is this day ordered that said petition be, and the same hereby is, denied.

By the Court. En Banc. October 20, 1975.

Supreme Court
State of Colorado
Certified to be a full, true and correct copy
DEC. 9, 1975
RICHARD D. TURELLI
Clerk of the Supreme Court
By Florence Walsh
Deputy Clerk



**CERTIFICATE OF MAILING**

I hereby certify that I have on this 6th day of October, 1975, mailed a true and correct copy of the foregoing Petition for Rehearing to the following named persons by depositing the same in the U.S. mail, postage prepaid:

Mr. John D. MacFarlane
Attorney General
104 State Capitol Building
Denver, Colorado 80203

Mr. Jean E. Dubofsky
Deputy Attorney General
104 State Capitol Building
Denver, Colorado 80203

Mr. James W. Wilson
Assistant Attorney General
104 State Capitol Building
Denver, Colorado 80203

Mr. Dale Tooley
District Attorney
West Side Court Building
Denver, Colorado 80204

Ms. Brooke Wunnicke
Chief Appellate Deputy District Attorney
West Side Court Building
Denver, Colorado 80204

/s/ Peg Ralston
Secretary

Supreme Court, U. S.
FILED
MAR 17 1976
MICHAEL RODAK, JR., CLERK

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1975**

**No. 75-1013**

ANTHONY L. BRONCUCIA,
*Petitioner*,
v.
THE PEOPLE OF THE STATE OF COLORADO,
*Respondent*.

**On Petition for Writ of Certiorari**
**To the Colorado Supreme Court**

# BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN D. MacFARLANE, *Attorney General*
JEAN E. DUBOFSKY, *Deputy Attorney General*
JAMES W. WILSON, *Assistant Attorney General*
1365 Logan Street
Denver, Colorado 80203

DALE TOOLEY, *District Attorney*
BROOKE WUNNICKE, *Special Prosecutor*
Second Judicial District
West Side Court Building
Denver, Colorado 80204

ATTORNEYS FOR RESPONDENT

PEERLESS PRINTING CO., 1989 BROADWAY, DENVER, COLORADO 80202

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1975**

**No. 75-1013**

| | | |
|---|---|---|
| ANTHONY L. BRONCUCIA, *Petitioner*, | ) | |
| v. | ) | ENTRY OF APPEARANCE |
| THE PEOPLE OF THE STATE OF COLORADO, *Respondent*. | ) | |

Brooke Wunnicke states that (1) she is the Special Prosecutor in the above-captioned case by appointment of Dale Tooley, District Attorney in and for the Second Judicial District, State of Colorado, and (2) she hereby enters her appearance in such capacity in the captioned cause.

Dated March 16, 1976.

BROOKE WUNNICKE
*Special Prosecutor*

## TABLE OF CONTENTS


| | Page |
|---|---|
| LIST OF AUTHORITIES | iii |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| QUESTIONS PRESENTED | 2 |
| CONSTITUTIONAL PROVISIONS AND RULE INVOLVED | 2 |
| STATEMENT | 3 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 4 |
| CONCLUSION | 11 |
| Appendix A | 12 |
| Appendix B | 17 |
| Certificate of Service | 21 |


## LIST OF AUTHORITIES
### Case Cited


| | Page |
|---|---|
| *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962) | 7, 8, 9 |
| *Brown v. Atwell, Administrator*, 92 U.S. 327, 23 L.Ed. 511 (1875) | 5 |
| *California v. Krivda*, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972) | 7 |
| *Commercial Bank of Cincinnati v. Buckingham's Ex'rs*, 46 U.S. 317, 12 L.Ed. 169 (1847) | 5, 6 |
| *Department of Motor Veh. of State of California v. Rios*, 410 U.S. 425, 93 S.Ct. 1019, 35 L.Ed.2d 398 (1973) | 7 |
| *Duncan v. Tennessee*, 405 U.S. 127, 92 S.Ct. 785, 31 L.Ed.2d 86 (1972) | 7 |

## LIST OF AUTHORITIES (Continued)
### Case Cited

| | Page |
|---|---|
| *Enterprise Irrig. Dist. v. Canal Co.*, 243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917) | 7 |
| *Lynch v. New York*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934) | 6, 7, 10 |
| *Mental Hygiene Dept. v. Kirchner*, 380 U.S. 194, 85 S.Ct. 871, 13 L.Ed.2d 753 (1965) | 7 |
| *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) | 4, 9, 10 |
| *People v. Austin*, 159 Colo. 445, 412 P.2d 425 (1966) | 8 |
| *People v. Broncucia*, Colo., 540 P.2d 1101 (1975) | 1, 3 |
| *Walters v. City of St. Louis*, 374 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1953) | 7, 8 |
| **Revised Rules of the Supreme Court of the United States** | |
| Rule 19(1) (a), 28 U.S.C.A. | 1, 3, 4, 5, 7, 11 |
| **United States Constitution** | |
| Fifth Amendment | 2 |
| Fourteenth Amendment | 2 |

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1975**

**No. 75-1013**

ANTHONY L. BRONCUCIA,
*Petitioner*,
v.
THE PEOPLE OF THE STATE OF COLORADO,
*Respondent*.

**On Petition for Writ of Certiorari**
**To the Colorado Supreme Court**

BRIEF FOR THE RESPONDENT IN OPPOSITION

## OPINION BELOW

The opinion of the Colorado Supreme Court is reported as *People v. Broncucia*, Colo., 540 P.2d 1101 (1975).

## JURISDICTION

The judgment of the Colorado Supreme Court was entered on September 15, 1975. A petition for rehearing was denied October 20, 1975, and the petition for a writ of certiorari was filed on January 16, 1976. The jurisdiction of this Court is invoked under Rule 19(1) (a)

of the Revised Rules of the Supreme Court of the United States, 28 U.S.C.A.

## QUESTIONS PRESENTED

1. Whether the United States Supreme Court should grant certiorari to decide an alleged federal question which was *not* decided by the Colorado Supreme Court.

2. Whether a matter of state law becomes a federal question solely because of petitioner's allegation that it is so.

## CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

United States Constitution, Amendment Five:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment Fourteen:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



Rule 19, Revised Rules of the Supreme Court of the United States. *Considerations governing review on certiorari*.

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

## STATEMENT

Anthony L. Broncucia (hereinafter "Petitioner") was convicted of perjury and conspiracy to commit perjury, in the District Court of the City and County of Denver. The conviction for perjury was reversed by the Colorado Supreme Court, and the conviction for conspiracy to commit perjury was affirmed. *People v. Broncucia*, Colo., 540 P.2d 1101 (1975.) Rehearing was denied by the Colorado Supreme Court on October 20, 1975.

Petitioner filed a petition for a writ of certiorari in the Supreme Court of the United States on January 16, 1976.

For purposes material herein, the People accept the statement of facts as found in the opinion of the Colorado Supreme Court, attached hereto as Appendix A and incorporated here by this reference.

## SUMMARY OF ARGUMENT

Petitioner's conviction for conspiracy to commit perjury at an extradition hearing has been affirmed by the Colorado Supreme Court. In its opinion, the Colorado Supreme Court cited no United States decisions or statutes, but relied entirely upon Colorado law.

Granting certiorari in this case would be improvident, because nothing in the record indicates that "a state court has *decided* a *federal* question of substance not theretofore determined by this court, or has *decided* it in a way probably not in accord with applicable decisions of this court." Rule 19(1) (a), Revised Rules of the Supreme Court of the United States. (Emphasis added.)

Petitioner seeks to *create* a federal question by discussing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Yet the trial court found that Petitioner had been given adequate *Miranda* warnings (f. 795), and that finding was not disturbed on appeal.

Petitioner then alleges that Colorado law required additional warnings, beyond *Miranda*, in the circumstances of this case. Surely, the requirements of Colorado law must be determined in the first instance by the Colorado courts. The Colorado Supreme Court did not speak at all to the issue of warnings, evidently being content with the decision reached by the trial court on its interpretation of the requirements of Colorado law.

The alleged federal question, therefore, that formed no part of the Colorado Supreme Court decision, cannot properly support United States Supreme Court jurisdiction on a writ of certiorari.

## ARGUMENT

1. Certiorari should not be granted under Rule 19(1) (a), because the State Supreme Court has not addressed itself to any federal question, but has based its decision entirely on State law.

Rule 19(1) (a) of the Revised Rules of the Supreme Court of the United States states:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring



> the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Since earliest times, this rule, and its predecessors have been interpreted to mean that the United States Supreme Court will not take jurisdiction of a case unless the decision in the state court was *based* upon a federal question.

> "We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and *that it was actually decided*, or that the judgment as rendered could not have been given without deciding it." *Brown v. Atwell, Administrator*, 92 U.S. 327, 341, 23 L.Ed. 511 (1875.) (Emphasis added.)

Similarly, the Court has stated that:

> "The first and only question necessary to be decided in the present case is, whether this court has jurisdiction.
>
> "To bring a case for a writ of error or an appeal from the highest court of a State, within the twenty-fifth section of the Judiciary Act, it must appear on the face of the record, 1. That some of the questions stated in that section did arise in the State court; and, 2. That the question was decided in the State court, as required in the section.
>
> "It is not enough, that the record shows that 'the plaintiff in error contended and claimed' that the judgment of the court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and

'that this claim was overruled by the court'; but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment . . .It is the peculiar province and privilege of the State courts to construe their own statutes; and is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary.

*"We are of opinion, therefore, that this case must be dismissed for want of jurisdiction." Commercial Bank of Cincinnati v. Buckingham's Ex'rs.*, 46 U.S. 317, 12 L.Ed. 169, 181 (1847.)

In 1934 the United States Supreme Court stated that:

> ". . . jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record. It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.
>
> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.



> "As the record fails to show jurisdiction in this Court, the writ of certiorari is dismissed as improvidently granted." *Lynch v. New York*, 293 U.S. 52, 54-55, 55 S.Ct. 16, 79 L.Ed. 191 (1934.)

In 1953, the United States Supreme Court, speaking through Mr. Justice Jackson, stated simply "Of course we will not undertake to review what the court below did not decide." *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1953.)

The same line of authority remained firm in 1972, when the Court stated, *Per Curiam*:

> "We granted certiorari in this case, . . .to consider questions seemingly presented under the constitutional guarantee against double jeopardy. After briefing and oral argument, it now appears that those questions are so interrelated with rules of criminal pleading peculiar to the State of Tennessee, the constitutionality of which is not at issue, as not to warrant the exercise of the certiorari jurisdiction of this Court . . .See U.S.Sup.Ct. Rule 19(1) (a). The writ is, therefore, dismissed as having been improvidently granted." *Duncan v. Tennessee*, 405 U.S. 127, 92 S.Ct. 785, 31 L.Ed.2d 86 (1972.)

Like results have been reached in *Department of Motor Vehicles of State of California v. Rios*, 410 U.S. 425, 93 S.Ct. 1019, 35 L.Ed.2d 398 (1973); *California v. Krivda*, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972); *Mental Hygiene Dept. v. Kirchner*, 380 U.S. 194, 85 S.Ct. 871, 13 L.Ed.2d 753 (1965); *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962); *Enterprise Irrig. Dist. v. Canal Co.*, 243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917), among others.

In the face of such consistent adherence to the principle of judicial self-restraint, it would be unusual, indeed, if the Supreme Court were to grant certiorari under Rule 19(1) (a) in the instant

case where no federal question, statute, or case was even *discussed* by the Colorado Supreme Court in affirming Petitioner's conviction of conspiracy.

2. A matter of State law does not become a federal question merely because of Petitioner's allegation that it is so.

A. Alleged requirements of State laws must be determined in the first instance by State courts.

Petitioner has alleged that "*the rule in Colorado* is that a 'potential defendant before a grand jury' must be 'fully advised *both* of his constitutional rights *and* that he is the subject of the investigation.' *People v. Austin*, 159 Colo. 445 . . .(1966)." (Petition of Petitioner pp. 8-9.) (Emphasis added.)

Certainly, if this be a state law, it must first be determined by the State courts. *Walters v. City of St. Louis, supra.*

The law, if it exists, was set forth in *People v. Austin*, 159 Colo. 445, 412 P.2d 425 (1966) in a fact situation in which the defendant *had* been "fully advised both of his constitutional rights and that he . . .[was] . . .the subject of the investigation." *People v. Austin, supra*, at 448. The issue in that case was *not* whether defendant had been properly advised of his rights, but whether testimony which he had given after advisement could be used against him. Thus, because there was no problem in the adequacy of the advisement, the case did *not* determine the particular steps necessary for advisement in Colorado.

But even if the Colorado courts had been mistaken in the application of Colorado law, that mistake would still not create a federal question.

> "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decision . . . [or] immunity from judicial error.' [Citations omitted.] Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.



> Finally, were we to vacate this conviction because of a failure to follow certain procedures although it has not been shown that their ultimate end—a fair grand jury proceeding—was not obtained, we would be exhaulting form over substance contrary to our previous application of the Equal Protection Clause." *Beck v. Washington*, 369 U.S. 541, 554-555, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962).

B. Where, as in the instant matter, the state trial court finds that sufficient *Miranda* warnings have been given, that finding may not be disturbed on appeal in the absence of manifest error, and here the record discloses no such error.

Petitioner seeks to *create* a federal question in this case by reference to *Miranda*. But full, adequate *Miranda* warnings *were given* to Petitioner *before* he gave the testimony he here claims should have been suppressed.

We here quote from the record, the advisement given, and the findings made by the trial court:

> "MR. LITTLE: Can I read into the record the advisement?
>
> "Q. Mr. Broncucia, before we ask you any questions, I would like to advise you of your pertinent legal rights. You have been called here to testify by the Grand Jury pursuant to an investigation the Grand Jury is conducting at this time. Before we enter into any questioning at all, I must advise you that you have the right to remain silent in that you may refuse to answer any questions that you feel may tend to incriminate or degrade you.
>
> "You don't have a blanket right to refuse to testify. You have a right to refuse to testify only if you feel the questions may tend to degrade or incriminate you. It's commonly called the Fifth Amendment right.
>
> "You have a right to consult with an attorney and have him explain your rights to you. If you cannot afford an attorney, the Court will appoint an attorney for you."

The trial court found the advisement to be sufficient both as to the special requirements of Colorado law and as to federal constitutional requirements:

> "There is an absence of evidence at this point in the record that the defendant was at that time a putative defendant or suspicion had focused on him to the extent that perhaps further advisement might have been in order, but the Court has no evidence before it at this point to conclude that the defendant was a focused-on defendant. However, so the record will be complete, even assuming the defendant was a putative defendant, the Court believes that the advisement given to him at that time was an adequate advisement to properly apprise him of his constitutional rights."

The full record of the advisement and the findings of the trial court are attached hereto as Appendix B and incorporated here by this reference.

Thus, the trial court found that *Miranda* warnings were given and that such warnings were adequate to advise Petitioner of his rights.

It is true that Petitioner continued to mention the *Miranda* question, with many other issues, in his brief to the Colorado Supreme Court. But the Colorado Supreme Court, having the full record before it, did not consider Petitioner's *Miranda* arguments to have enough merit to require even minimal discussion. So there is no mention of a *Miranda* issue in the decision by the Colorado Supreme Court.

Petitioner himself did not take the *Miranda* allegation seriously enough to have raised it on oral argument before the Colorado Supreme Court (Petition of Petitioner p. 6).

> "Nor can claim of jurisdiction be sustained by reference to *briefs* and statements which are not part of the record." *Lynch v. New York, supra* at 293 U.S. 54. (Emphasis added.)



C. An alleged federal question, which formed no part of the State Supreme Court decision, should not form the basis for United States Supreme Court jurisdiction on a writ of certiorari.

We therefore, return to the primary issue of this petition for certiorari. Is this, in fact, a case in which a "state court has *decided* a federal question of substance?"

The Respondent asserts that no federal question has in fact been decided by the Colorado Supreme Court. Certainly there are no citations to federal statutes or decisions in the opinion of the Colorado Supreme Court. Whatever federal issues Petitioner may have attempted to create below, those issues simply were not deemed to have been authentic enough to require even serious consideration by the Colorado Supreme Court. It would seem highly unusual for a state court to "decide" an important federal question without mentioning it.

## CONCLUSION

The Supreme Court should not grant certiorari, under Rule 19(1) (a), because no federal question was, in fact, decided by the Colorado Supreme Court.

Respectfully submitted.

JOHN D. MacFARLANE, Attorney General
JEAN E. DUBOFSKY, Deputy Attorney General
JAMES W. WILSON, Assistant Attorney General
DALE TOOLEY, District Attorney
BROOKE WUNNICKE, Special Prosecutor

ATTORNEYS FOR RESPONDENT

March 16, 1976.

## APPENDIX A

**The PEOPLE of the State of Colorado,**
**Plaintiff-Appellee,**
**v.**
**Anthony L. BRONCUCIA, Defendant-Appellant.**
**No. 26557.**

Supreme Court of Colorado,
En Banc.
September 15, 1975.
Rehearing Denied October 20, 1975.

GROVES, Justice.

This is a companion case to *People v. Ciari*, Colo., 540 P.2d 1094, and *People v. Quintana*, Colo., 540 P.2d 1097, announced contemporaneously with this opinion. Defendant appeals from convictions of perjury, and conspiracy to commit perjury. We reverse as to the perjury conviction and affirm as to the conspiracy conviction.

An extradition hearing was held upon one Griswold's application for a writ of habeas corpus contesting Griswold's extradition to Nevada for criminal proceedings against him involving an alleged "diamond switch." The evidence shows that the defendant gave Griswold a receipt for expenses resulting from a birthday party which was supposed to have been held at the defendant's place of business, Mickey's Inn, in Denver on February 7, 1970. The receipt was introduced at the extradition hearing for the purpose of showing Griswold's presence in Denver on the day of the alleged diamond switch. Although defendant declined to testify at the extradition hearing, he did testify at subsequent grand jury proceedings. This testimony, the People allege, corroborated the testimony given by alleged co-conspirators at the extradition hearing, all of which supported Griswold's alibi.



The resulting grand jury indictment, alleged that defendant committed perjury by testifying falsely before the Denver Grand Jury as follows:

"Q Specifically, Mr. Broncucia, relating to the date of February 7th, did you see Mr. Griswold on that date?

"A Well, if you can allow me to explain a little bit.

"Q Yes, if you would, please.

"A I don't particularly know whether that's the particular date. I know he was there on a Saturday, but actually the date, I don't recall it, you know.

"Q I see. What do you recall about whatever date it was that he was there?

"A Well, they were there, and he had a party. I believe it was a birthday party for his girlfriend or wife.

"Q Would that be Linda Wilson?

"A I don't know.

"Q Could you describe that girlfriend?

"A I sure couldn't.

"Q Did you know any of the people there?

"A Yes, some of them.

"Q And who were the names that you recall?

"A Robert Quintana was present, but I wasn't—I am divorced, and I get my child weekly, and I wasn't present at the party all day long or anything. I just—

"Q Do you recall what kind of a party it was specifically?

"A It was a birthday party.

"Q Now, let me make sure before we conclude that I understand your testimony. Your testimony is that on the date of the party in February 1970—and you are not sure whether that's the 7th, but you are sure it's a Saturday—

"A I'm sure it's on a Saturday, and I'm almost sure it's February. I guess I could be wrong and it could be the last Saturday of January or something like that, but—

"Q But there was a party Mr. Griswold gave for some young lady and at this party you gave him a receipt before he left Mickey's Inn that date?

"A Yeah.

"Q And the receipt is not the same receipt as we have here today before you, Grand Jury Exhibit A?

"Q That you did give him a receipt on that date?

"A I gave him a receipt on the day of the party."

I

[1] Defendant contends that the perjury charge failed to set forth with sufficient specificity the falsity of the defendant's statements so as to enable him to prepare his defense. We agree.

The device by which the defendant was charged with perjury in the indictment was a verbatim partial transcript of the defendant's actual testimony before the grand jury. There was no averment of fact to demonstrate the falsity of the testimony on which the charge was based. The failure to aver the true facts has been held to be proper when the truth of the disputed matter was clear by "necessary implication" so that the defendant will be apprised of the reasons for his statements being charged as false. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973). Here, however, in the light of the defendant's equivocations and the failure of the People to prove the falsity of the defendant's equivocal testimony, his conviction of perjury cannot stand.



II

The defendant asserts that the charge in Count Ten is fatally defective in that it is duplicitous, *i. e.*, it charges two separate and distinct crimes of conspiracy in one count. *See Marrs v. People*, 135 Colo. 458, 312 P.2d 505 (1957). Count Ten charged a conspiracy to commit perjury between February 7, 1970, and August 1, 1973. He contends that Count Ten in fact charges two separate and distinct conspiracies: one, to commit perjury at the extradition hearing, and, two, to commit perjury during the grand jury proceedings. He argues that the object of the first conspiracy was to prevent the extradition of Griswold, while the object of the second conspiracy, if there was one, must have been to avoid criminal prosecution.

[2,3] In a prosecution for conspiracy, considerable latitude is allowed because of the inherent problems of proof involved in proving a crime, the veil around which is secrecy. This court, in *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973), stated:

> "Since conspiracy is a crime that is born in secrecy and bred in the alleys of deceit, it is often impossible for the prosecution to define the four corners of a conspiracy, either as to members or as to objects. Often, the prosecution cannot determine the extent of a conspiracy or the identity of the members of the conspiracy at a particular time until all the evidence is in."

In this case, as in *People v. Incerto, supra*, the defense was not surprised by the proof, nor were the substantial rights of the defendant affected, and thus reversible error did not occur.

The defendant made a motion for a bill of particulars as to Count Ten, which motion was granted. The resulting bill of particulars set forth that the defendant executed and delivered a receipt dated February 7, 1970, and attended meetings between the coconspirators, all before the date of the extradition hearing. This gave the defendant adequate notice as to the charge the People

would attempt to prove—a conspiracy to commit perjury at the extradition hearing.

Included in the bill of particulars, was the allegation that the defendant gave false testimony before the Grand Jury on July 14, 1972. This statement was not improperly included against the defendant as it tended to show his participation in the conspiracy, even though the object of the conspiracy charged (the defeat of the extradition of Griswold) had by that time failed.

Moreover, the court instructed the jury that the conspiracy charge related to the extradition hearing, thereby avoiding the possibility that the defendant could have been convicted of conspiracy to commit perjury before the Grand Jury.

We find no substantial prejudice in the charge or in the instruction and, therefore, affirm.

The judgment is reversed as to perjury and is affirmed as to the conspiracy conviction, and the cause is remanded for disposition consonant with the views expressed in this opinion.

ERICKSON, J., recuses himself.



## APPENDIX B

MR. LITTLE: Can I read into the record the advisement?

"Q Mr. Broncucia, before we ask you any questions, I would like to advise you of your pertinent legal rights. You have been called here to testify by the Grand Jury pursuant to an investigation the Grand Jury is conducting at this time. Before we enter into any questioning at all, I must advise you that you have the right to remain silent in that you may refuse to answer any questions that you feel may tend to incriminate or degrade you.

You don't have a blanket right to refuse to testify. You have a right to refuse to testify only if you feel the questions may tend to degrade or incriminate you. It's commonly called the Fifth Amendment right.

You have a right to consult with an attorney and have him explain your rights to you. If you cannot afford an attorney, the Court will appoint an attorney for you.

May I first ask, do you have an attorney?

A Yes, I do.

Q And his name, please?

A Ed Towey.

Q And how do you spell that?

A T-o-w-e-y.

Q And did Mr. Towey accompany you here today?

A Yes, he has.

Q And have you had occasion to consult with him regarding your legal rights?

A Yes, I have.

Q And is he out in the hall at this time?

A Yes, he is.

Q I would advise you that if at any time you have a question as to whether or not any answer you may give may tend to incriminate you or degrade you that you may seek the advice of counsel. In other words, you may ask permission to leave the Grand Jury Chambers and may consult with Mr. Towey. Do you understand each of the rights I have given you at this time?

A Yes, I do.

Q Knowing these rights, do you wish to voluntarily testify before the Grand Jury?

A Yes, I do."

I think that is a complete warning; it is more than adequate, and we would stand on it, your Honor.

THE COURT: Based upon the evidence before the Court, the Court will find on or about July 14, 1972, the defendant appeared before the Grand Jury, a special statutory Grand Jury, and was accompanied by counsel, Mr. Edward Towey, and the defendant was sworn in and immediately thereafter was advised that he was called before the Grand Jury pursuant to an investigation the Grand Jury was conducting at that time. Before any questioning, the defendant was advised that he had a right to remain silent and to refuse to answer any questions that he felt might tend to incriminate or degrade him, and that he had a right to consult with an attorney and have him explain the rights to him, and if he could not afford an attorney, the Court would appoint one for him. The defendant was thereafter asked whether or not he had an attorney, and the defendant stated that he did; and his attorney, Mr. Towey, had accompanied the defendant to the Grand Jury proceeding. The defendant further



responded that he had occasion to consult with Mr. Towey regarding his legal rights, and Mr. Towey was then out in the hall outside the Grand Jury room. The defendant was then advised that if at any time he had any question as to whether or not he should answer any question that might tend to incriminate him or degrade him, he could seek the advice of counsel and expressly request permission to leave the Grand Jury Chambers and consult with his attorney, Mr. Towey. The defendant was asked whether he understood these rights, and he stated that he did. And he was then asked knowing these rights, did he voluntarily wish to testify before the Grand Jury, and the defendant stated that he would. The Court would further find thereafter the defendant was interrogated in the course of the Grand Jury investigation and made various responses to questions, and the questions and answers are set forth in Defendant's Exhibit Number 1 which has been admitted for the purpose of this hearing.

The Court would conclude that the defendant was properly advised of his constitutional rights of self-incrimination and his privilege to refuse to answer any questions. He was properly advised that he had a right to an attorney and the right to confer with an attorney, and the Court would further find that the defendant's attorney did, in fact, accompany the defendant to the Grand Jury hearing; and the defendant had previously conferred with his counsel with respect to his rights at the Grand Jury proceeding. Based upon the record as made, the Court would conclude that the defendant fully understood his privilege against self-incrimination and his right to refuse any questions that might tend to incriminate him, and the defendant fully understood his right to counsel. Based upon the record as made and the warning as set forth in Defendant's Exhibit Number 1, and the fact that the defendant had, in fact, conferred with counsel prior to appearing before the Grand Jury and had counsel accompany him, the Court would conclude the only reasonable inference that can be drawn is that the defendant knew that anything he said before the Grand Jury could and would be used against him. Knowing all of these things, the defendant freely and intelligently waived his constitutional rights and proceeded to testify before the Grand Jury. The Court believes that while the advisement

is not ideally consistent with the four corners of Miranda, nevertheless, the defendant, based upon the record, fully understood his Miranda rights and fully understood his privilege against self-incrimination and his right to refuse to answer any incriminatory questions and further understood that any responses he did make could and would be used against him. The Court would note for the record the recent case of *People v. Spencer* at 512 P.2d, page 260, where the defendant was convicted of perjury and claimed that the trial court erred in not suppressing the defendant's testimony before the Grand Jury because of the failure to advise them of their right against self-incrimination. The Grand Jury testimony was admitted, and the Supreme Court affirmed the defendants' conviction; and I would merely state this for the record the court stated that, "It has long been the law in Colorado that a defendant cannot be called before a Grand Jury which is investigating the suspected offenses unless the putative or focused-on defendant is fully warned of his or her privilege against self-incrimination. This principle remains true, of course, even though the focused-on defendant is not yet formally charged. Admittedly, the Spencers were not given any warning when they appeared before the Grand Jury. The required warning, however, relates to admissions concerning past acts, and its absence does not grant witnesses the right to commit perjury before the Grand Jury.

"The Fifth Amendment grants a witness the right to remain silent and not incriminate himself. However, the constitutional protection extends only to past acts, not to those that are or may be committed in the future." The Court pointed out when the Spencers testified before the Grand Jury they did not incriminate themselves in regard to a past offense but committed the crime of perjury by their statement relating to the alleged assault incident under investigation. The court further noted that the Spencers were indicted for their alleged false testimony and not for previous conduct which they admitted by their testimony before the Grand Jury. The Court believes that the *Spencer* case is very close factually to the situation at hand, and we do have in this particular case the additional warning given by the District Attorney prior to his questioning



before the Grand Jury which the Court has ruled was adequate; and we do have the voluntary waiver of the defendant after being advised of his rights, and we do have the fact that the defendant was accompanied by counsel prior to his appearance before the Grand Jury and had, in fact, conferred with counsel concerning his rights.

There is an absence of evidence at this point in the record that the defendant was at that time a putative defendant or suspicion had focused on him to the extent that perhaps further advisement might have been in order, but the Court has no evidence before it at this point to conclude that the defendant was a focused-on defendant. However, so the record will be complete, even assuming the defendant was a putative defendant, the Court believes that the advisement given to him at that time was an adequate advisement to properly apprise him of his constitutional rights. And from the record as made, the Court can only conclude that the defendant freely and intelligently waived those rights and proceeded to testify before the Grand Jury. So, for these reasons, the motion to suppress will be denied. Now, any other preliminary matters?

**CERTIFICATE OF SERVICE**

I do hereby certify that on the 16th day of March, 1976, I placed in the United States mails, postage prepaid and properly sealed and addressed, a true and correct copy of the foregoing Brief for the Respondent in Opposition to: EDWARD B. TOWEY, Attorney for Petitioner, 1701 West 72nd Avenue, Suite 210, Denver, Colorado 80221.

BROOKE WUNNICKE
Special Prosecutor

Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

75-1013

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF COLORADO, | ) | |
| Plaintiff-Respondent, | ) | PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI |
| v. | ) | |
| ANTHONY L. BRONCUCIA, | ) | |
| Defendant-Petitioner, | ) | |

PETITION FOR CERTIORARI
FROM JUDGMENT OF COLORADO SUPREME COURT

EDWARD B. TOWEY
Attorney for Defendant-Petitioner
1701 West 72nd Avenue, Suite 210
Denver, Colorado 80221
Telephone: 303-428-7411

JOHN D. MACFARLANE, Attorney General
JEAN E. DUBOFSKY, Deputy Attorney General
JAMES W. WILSON, Assistant Attorney General
1365 Logan Street
Denver, Colorado 80203
Telephone: 303-892-2107

DAVE TOOLEY, District Attorney
BROOKE WUNNICKE, Chief Appellate
Deputy District Attorney
West Side Court Building
1460 Kalamath
Denver, Colorado 80204
Telephone: 303-297-5824

IN THE SUPREME COURT
OF
THE UNITED STATES

75-1013

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Respondent, | ) | |
| v. | ) | PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI |
| ANTHONY L. BRONCUCIA, Defendant-Petitioner, | ) | |

COMES NOW Anthony L. Broncucia, by and through his Attorney, Edward B. Towey, and for his Petition for Rehearing on Petition for Certiorari, states as follows:

1. The Petitioner hereby requests, pursuant to Rule 59 of the Revised Rules of the Supreme Court of the United States, a rehearing on his petition for certiorari in Broncucia v. Colorado, 75-1013. An order denying certiorari was entered May 31, 1977.

2. The Supreme Court of the United States has granted certiorari in another case which raises the very questions presented in this case in United States v. Washington, 74-1106, certiorari granted 96 S. Ct. 2224. This case



was argued before the Supreme Court on December 6, 1976 but has not yet been decided. Specifically, the questions presented in these cases are whether a witness before a grand jury, who is a potential defendant, must be warned of that fact; and if the witness is not so warned, whether his testimony before the grand jury must be suppressed at trial. In light of the Court having granted certiorari in United States v. Washington, fairness demands that certiorari also be granted in this case.

3. The Petitioner requests that this Petition be held until a decision is reached in United States v. Washington.

Respectfully submitted,

Edward B. Towey

EDWARD B. TOWEY

IN THE SUPREME COURT
OF
THE UNITED STATES

75-1013

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Respondent, | ) | CERTIFICATE OF COUNSEL |
| v. | ) | |
| ANTHONY L. BRONCUCIA, Defendant-Petitioner, | ) | |

COMES NOW Edward B. Towey, Attorney for Anthony L. Broncucia, and certifies as follows:

1. That the Petition for Rehearing on Petition for Certiorari is presented in good faith and not for delay.

2. That the grounds for the Petition for Rehearing on Petition for Certiorari is restricted to substantial grounds available to Petitioner not previously presented.

Edward B. Towey

EDWARD B. TOWEY

CERTIFICATE OF MAILING

I hereby certify that I have on this 16th day of June, 1977, mailed a true and correct copy of the foregoing Petition for Rehearing to the following named persons by depositing the same in the U.S. mail, postage prepaid:

Mr. John D. MacFarlane
Attorney General
104 State Capitol Building
Denver, Colorado 80203

Ms. Jean E. Dubofsky
Deputy Attorney General
104 State Capitol Building
Denver, Colorado 80203

Mr. James W. Wilson
Assistant Attorney General
104 State Capitol Building
Denver, Colorado 80203

Mr. Dale Tooley
District Attorney
West Side Court Building
Denver, Colorado 80204

Ms. Brooke Wunnicke
Chief Appellate Deputy District Attorney
West Side Court Building
Denver, Colorado 80204

Elizabeth L. Santoyo
Secretary